(2)

Supreme Ct. FILED

No. 04 264 AUG 25 2004

OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT RAY COURTNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES R. HOBBS
(*Counsel of Record*)
W. BRIAN GADDY
WYRSCH HOBBS & MIRAKIAN, P.C.
1101 Walnut, Ste. 1300
Kansas City, MO 64106
(816) 221-0080

DAVID B.B. HELFREY
GARY W. HART
HELFREY SIMON & JONES, P.C.
120 South Central, Ste. 1500
St. Louis, MO 63105
(314) 725-9100

Attorneys for Petitioner

August 25, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the use of judicial findings of fact by a preponderance of the evidence to upwardly depart from an applicable guideline range of 210 to 262 months imprisonment to a sentence of 360 months violated the Petitioner's Sixth Amendment right to a jury trial and the rule announced by this Court in *Blakely v. Washington*, 124 S. Ct. 2531 (2004)?

2. If the Guidelines are determined to be constitutional, whether the upward departure in this case from an applicable range of 210 to 262 months to a sentence of 360 months imprisonment constitutes an incorrect application of the Sentencing Guidelines and an unreasonable departure in violation of 18 U.S.C. §§ 3553(b) and 3742, and the Due Process Clause of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Petition	7
Conclusion	23

Appendix

Opinion of the United States Court of Appeals for the Eighth Circuit Dated and Filed April 5, 2004 ..... App. 1

Order of the United States District Court for the Western District of Missouri Dated December 5, 2002, Specifying Reasons for Upward Departure ... App. 14

Opinion of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing Dated and Decided May 27, 2004 ..... App. 20

TABLE OF AUTHORITIES

Page

CASES:

Apprendi v. New Jersey, 530 U.S. 446 (2000) 9, 17

Blakely v. Washington, 124 S. Ct. 2531 (2004) .....*passim*

Griffith v. Kentucky, 479 U.S. 314 (1987) 9

Schriro v. Summerlin, 124 S. Ct. 2519 (2004) 8

Stinson v. United States, 508 U.S. 36 (1993) 22

United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) 10

United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004) 10, 12, 14

United States v. Courtney, 362 F.3d 497 (8th Cir. 2004) 1

United States v. Courtney, 240 F.Supp.2d 1052 (W.D. Mo. 2002) 1

United States v. Croxford, ___ F.Supp.2d ___, 2004 WL 1521560 (D. Utah, July 7, 2004) 11, 14

United States v. Fanfan, ___ F.Supp.2d ___, 2004 WL 1723114 (D. Me., June 28, 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004) 12, 14

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991) 20, 21

United States v. Lamoreaux, ___ F.Supp.2d ___, 2004 WL 1557283 (W.D. Mo., July 7, 2004) 11, 14

United States v. Mooney, 2004 WL 1636960 (8th Cir., July 23, 2004), *opinion vacated and reh'g granted* (Aug. 6, 2004) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Penaranda, 375 F.3d 238 (2d Cir. 2004) 11

United States v. Pineiro, ___ F.3d ___, 2004 WL 1543170 (5th Cir., July 12, 2004) 11

United States v. Pirani, 2004 WL 1748930 (8th Cir., Aug. 5, 2004), *opinion vacated and reh'g granted* (Aug. 16, 2004) 10

United States v. Shamblin, ___ F.Supp.2d ___, 2004 WL 1468561 (S.D. W. Va., June 30, 2004) 11

United States v. Terrell, ___ F.Supp.2d ___, 2004 WL 1661018 (D. Neb., July 22, 2004) 11

Williams v. United States, 503 U.S. 193 (1992) 17

STATUTES:

18 U.S.C. § 1365(a) 4

18 U.S.C. § 1365(a)(3) 4, 8

18 U.S.C. § 3231 4

18 U.S.C. § 3553(b) ..... i, 2, 10, 15

18 U.S.C. § 3742 i

18 U.S.C. § 3742(a)(3) 6

18 U.S.C. § 3742(e)(3)(C) 2, 16

18 U.S.C. § 3742(f)(2) 2, 16

21 U.S.C. § 331(k) 4

21 U.S.C. § 333(a)(2) 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 6

TABLE OF AUTHORITIES – Continued

Page

Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(d), 117 Stat. 650 (2003) 16

FEDERAL SENTENCING GUIDELINE PROVISIONS:

U.S.S.G. Ch.1, Pt.A, intro. comment. (n.4(b)) 15

U.S.S.G. § 1B1.2 ..... 3, 22

U.S.S.G. § 2N1.1(a) 4

U.S.S.G. § 2N1.1(b)(1)(A) 4

U.S.S.G. § 3A1.1(b)(1) 4, 20

U.S.S.G. § 3A1.1, comment. (n.2) 20

U.S.S.G. § 3A1.1(b)(2) 5

U.S.S.G. § 3B1.3 5

U.S.S.G. § 3D1.4, comment. (backg'd) 6

U.S.S.G. § 3D1.4(a) 5

U.S.S.G. § 3E1.1(a) 5

U.S.S.G. § 3E1.1(b)(2) 5

U.S.S.G. § 5K2.3 19

OTHER PROVISIONS:

U.S. Const., Amend. V 2, 22

U.S. Const., Amend. VI. 2

S. Rep. No. 225, 98th Cong., 1st Sess., 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 15

Supreme Court Rules 10(a) 12

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rules 10(c) 13

Supreme Court Rules 13.1 1

Supreme Court Rules 13.3 1

PETITION FOR A WRIT OF CERTIORARI

Robert R. Courtney respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit affirming the sentence and the upward departure is reported at *United States v. Courtney*, 362 F.3d 497 (8th Cir. 2004), and reprinted in the Appendix hereto at Pet. App. 1-13. The order entered by the United States District Court for the Western District of Missouri specifying reasons for the upward departure is reported at *United States v. Courtney*, 240 F.Supp.2d 1052 (W.D. Mo. 2002), and reprinted in the Appendix hereto at Pet. App. 14-19.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on April 5, 2004. Pet. App. at 1. Petitioner Robert Courtney timely filed a petition for rehearing and rehearing *en banc* in the Court of Appeals. On May 27, 2004, the Court of Appeals for the Eighth Circuit filed an order denying both the petition for rehearing and rehearing *en banc*. Pet. App. at 20. The present petition for a writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for a writ of certiorari, filed by a party

to a federal criminal case, to review the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const., Amend. VI.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend V.

18 U.S.C. § 3553(b) provides in relevant part: "[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4), unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

18 U.S.C. § 3742(e)(3)(C) provides in pertinent part: "(e) Consideration. Upon review of the record, the court of appeals shall determine whether the sentence . . . (3) is outside the applicable guideline range, and . . . (C) the sentence departs to an unreasonable degree from the applicable guidelines range. . . ."

18 U.S.C. § 3742(f)(2) provides in pertinent part: "If the court of appeals determines that . . . (2) the sentence is

outside the applicable guideline range . . . [and] the departure . . . is to an unreasonable degree. . . ."

Section 1B1.2(c) of the United States Sentencing Guidelines provides in pertinent part: "A plea agreement (written or orally made on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)."

Application Note 3 to section 1B1.2 of the United States Sentencing Guidelines provides in pertinent part: "Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. . . ."

Application Note 1 to section 2N1.1 of the United States Sentencing Guidelines provides in pertinent part: "Where the offense . . . caused extreme psychological injury . . . an upward departure may be warranted. . . ."

Application Note 2 to section 3A1.1 of the United States Sentencing Guidelines provides in pertinent part: "Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knew or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure. . . ."

Section 3D1.4 of the United States Sentencing Guidelines provides in pertinent part: "The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing

that offense level by the amount indicated in the following table . . . More than 5 [units] . . . add 5 levels."

The background commentary to section 3D1.4 of the United States Sentencing Guidelines provides in pertinent part: "Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 units."

STATEMENT OF THE CASE

Petitioner Robert R. Courtney, a licensed pharmacist, was charged by grand jury indictment with eight counts of tampering with a consumer product in violation of 18 U.S.C. §§ 1365(a) and 1365(a)(3) and twelve counts of adulteration and/or misbranding a drug in violation of 21 U.S.C. §§ 331(k) and 333(a)(2). Pet. App. at 2. The indictment alleged that Petitioner was a pharmacist who diluted several chemotherapy drugs before distributing them for administration to cancer patients. Pet. App. at 1. The district court had proper jurisdiction in this case pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

On February 26, 2002, Mr. Courtney entered pleas of guilty to each count of the indictment. Pet. App. at 2. With respect to the product tampering counts, the sentencing factors used to calculate the guideline range included a base offense level of twenty-five, U.S.S.G. § 2N1.1(a); a four level enhancement for causing life-threatening bodily injuries, U.S.S.G. § 2N1.1(b)(1)(A); a two level enhancement for vulnerable victims, U.S.S.G. § 3A1.1(b)(1); a two

level enhancement because there was a large number of vulnerable victims, U.S.S.G. § 3A1.1(b)(2); a two level enhancement for abuse of a position of trust, U.S.S.G. § 3B1.3; and a three level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a) and (b)(2). Pet. App. at 3-4. The guideline range also included a maximum enhancement of five levels pursuant to the grouping rules set forth in U.S.S.G. § 3D1.4(a), because each tampering count constituted a separate "unit" under the Guidelines that resulted in eight total units for the tampering offenses.[1] Pet. App. at 4. The group for the adulteration and misbranding offenses received no additional units by operation of the Guidelines because it was nine or more levels less serious than the groups for the product-tampering offenses. Pet. App. at 4.

The applicable guideline range was determined to be a level 37 and the criminal history to be category I. Pet. App. at 4. The corresponding guideline range of punishment was 210 to 262 months imprisonment. Pet. App. at 4. The district court departed upward from this range to impose a significantly higher sentence of 360 months imprisonment. Pet. App. at 4.

The district court expressed four reasons for upward departures. *See generally* Pet. App. at 14-19. Only two grounds, however, were addressed by the Eighth Circuit on appeal, and will be discussed herein. *See generally* Pet. App. at 1-13. One reason for departure was that the grouping rules of the Sentencing Guidelines resulted in Counts Six through Eight and Counts Nine through

[1] The Guidelines provide that the offense level should be enhanced five levels for a number of units "more than 5." U.S.S.G. § 3D1.4.

Twenty of the indictment being "disregarded." Pet. App. at 14-15. The district court relied on the commentary to section 3D1.4, which states that a departure may be warranted "in the unusual case where the additional offenses resulted in a total of significantly more than 5 units." Pet. App. at 15; *see also* U.S.S.G. § 3D1.4, comment. (backg'd). The other reason for departure reviewed by the Eighth Circuit was that the conduct of the Petitioner posed a unique and substantial risk of psychological injury to the victims. Pet. App. at 16-18.

The Eighth Circuit issued its opinion affirming the sentence and the upward departure on April 5, 2004. Pet. App. at 1. The Eighth Circuit had proper jurisdiction over the direct appeal pursuant to 18 U.S.C. § 3742(a)(3), which provides that a defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence is greater than the sentence specified in the applicable guideline range. The Eighth Circuit also had proper jurisdiction as conferred by 28 U.S.C. § 1291, which provides for jurisdiction of the court of appeals over appeals from final judgments of the district courts, except where direct review may be had in this Court.

With regard to Petitioner's argument under the grouping guidelines that eight units is not "significantly more than 5 units" to justify either an upward departure, or the extent of the departure, the Eighth Circuit concluded that the Guidelines calculations should have proceeded as if there had been 152 additional counts of product-tampering charges, based on additional relevant conduct. Pet. App. at 6-9. If the additional acts of dilution were treated as additional offenses that should have been grouped under the Guidelines, the Eighth Circuit concluded that there should have been either thirty-four or

twenty-six total units, which is "significantly more than five units" to support the grouping departure. Pet. App. at 7-8.

With respect to the upward departure for causing extreme psychological injuries, the Eighth Circuit concluded that letters written by victims and included within the victim impact section of the presentence investigation report supplied adequate evidence to support an upward departure. Pet. App. at 9-13.

The Petitioner timely submitted a motion for rehearing and rehearing *en banc*. The Eighth Circuit denied the motion for rehearing and/or rehearing *en banc* on May 27, 2004. Pet. App. at 20.

REASONS FOR GRANTING THE PETITION

I. The Upward Departure in this Case from a Guideline Range of 210 to 262 Months Imprisonment to a Sentence of 360 Months was Based on Judicial Findings of Fact Found by a Preponderance of the Evidence at Sentencing, Which Violated the Petitioner's Sixth Amendment Right to a Jury Trial and the Rule Announced By this Court in *Blakely v. Washington.*

This Court issued its decision in *Blakely v. Washington,* 124 S. Ct. 2531 (2004) on June 24, 2004. Since that time, there has been a veritable groundswell of opinion in the lower federal courts regarding the continued applicability and constitutionality of the United States Sentencing Guidelines. Some federal circuits have concluded that the *Blakely* decision applies only to upward adjustments,

enhancements and departures under the federal Guidelines that rest upon judicial findings of fact, while one other circuit has concluded that *Blakely* does not apply to the federal Sentencing Guidelines. District courts have also reached varied conclusions with regard to the Guidelines, including some holdings that the Guidelines are entirely unconstitutional.

This case involves a significant upward departure from the applicable guideline range of 210 to 262 months, up to a sentence of 360 months imprisonment. This departure was aggressively contested in all proceedings below. This departure rested on facts found by the district court using a preponderance of the evidence standard.

The upward departure in this case is similar to the exceptional sentence that was struck down in *Blakely v. Washington*. The findings of fact below concerning the additional relevant conduct and the purported psychological injuries of the victims that supported the upward departure decision were not alleged in the indictment, were not found by a jury, and were not admitted by the Petitioner.[2] Although the lower courts and the parties did not have the benefit of this Court's ruling in *Blakely*, its holding applies to Petitioner because his case is still on direct review. *See, e.g., Schriro v. Summerlin*, 124 S. Ct. 2519, 2522 (2004) ("When a decision of this Court results

[2] The Petitioner did admit in his plea agreement that he committed additional acts of dilution beyond the eight tampering counts alleged in the indictment. These admissions do not establish that the additional acts of tampering constitute the federal offense of tampering under 18 U.S.C. § 1365(a)(3), as Petitioner did not admit with respect to the additional acts of dilution that serious bodily injury occurred which is required under 18 U.S.C. § 1365(a)(3).

in a 'new rule,' that rule applies to all criminal cases still pending on direct review."); *Griffith v. Kentucky,* 479 U.S. 314 (1987).

A. This Court Should Resolve the Extraordinary Split of Circuit and District Court Authority Regarding the Proper Applicability of the Rule of Law Announced in *Blakely v. Washington* to the Federal Sentencing Guidelines

The defendant in *Blakely* entered a guilty plea to kidnaping, which corresponded to a guideline range under the Washington state guidelines of 49 to 53 months. At sentencing, the court imposed an exceptional sentence of 90 months, based on a judicial finding of fact that the offense constituted an act of "deliberate cruelty." The facts supporting the finding of deliberate cruelty were not admitted by the defendant at his guilty plea hearing.

Relying on the rule first announced in *Apprendi v. New Jersey,* 530 U.S. 446 (2000), this Court held in *Blakely* that any fact which increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt, or admitted by the defendant. *Blakely,* 124 S. Ct. at 2536-37. The term "statutory maximum" is the maximum sentence upon which a judge may impose solely on the basis of the facts reflected in jury verdict or admitted by the defendant. *See id.* In *Blakely,* the sentencing court could not have imposed the exceptional sentence of 90 months based solely on the facts admitted by the defendant during his guilty plea. *Blakely,* 124 S. Ct. at 2537-38. Similarly, the judge in this case could not have imposed the upward departure based solely on the facts admitted by the defendant at his guilty

plea hearing. The upward departure violates the Sixth Amendment and the rule announced in *Blakely.*

The majority opinion in *Blakely* indicated that the federal Guidelines were not before the Court and therefore expressed no opinion concerning the same. *Blakely,* 124 S. Ct. at 2538, n.9. Justice O'Connor observed, however, that the majority opinion in *Blakely* will be far-reaching to other guidelines systems, including the federal system. *See Blakely,* 124 S. Ct. at 2548-49 ("Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b). . . .") (O'Connor, J., dissenting). Perhaps in response to the opinion of Justice O'Connor, the lower federal appellate and district courts have reached varied conclusions about the continued constitutionality and applicability of the federal Sentencing Guidelines in the wake of the *Blakely* opinion.

The Seventh and Ninth Circuits have held that the Guidelines as a whole remain constitutional, but any judicial findings of fact used to support upward enhancements or adjustments must comply with the Sixth Amendment right to a jury trial. *See United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004); *United States v. Booker,* 375 F.3d 508 (7th Cir. 2004), *cert. granted,* ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004). One panel of the Eighth Circuit initially observed that "at a minimum," the ruling in *Blakely* applies to upward enhancements under the Sentencing Guidelines which rest upon judicial findings of fact. *See United States v. Pirani,* 2004 WL 1748930 (8th Cir., Aug. 5, 2004), *opinion vacated and reh'g granted* (Aug. 16, 2004). Another panel opinion from the Eighth Circuit initially concluded that the Guidelines are entirely unconstitutional. *United States v. Mooney,* 2004 WL 1636960 (8th Cir., July 23, 2004), *opinion*

vacated and reh'g granted (Aug. 6, 2004). As noted, these opinions have now been vacated by the Eighth Circuit.

The Fifth Circuit has concluded that judicial findings of fact pursuant to the Sentencing Guidelines remain constitutional. *See United States v. Pineiro*, ___ F.3d ___, 2004 WL 1543170 (5th Cir., July 12, 2004). The Second Circuit sought guidance from this Court by taking the unusual step of certifying three questions for this Court to review, including whether a judge can properly find facts for sentencing purposes not reflected in the jury verdict or admitted by the defendant. *See United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004).

There has also been a wide variety of opinions from district courts regarding the Sentencing Guidelines. *Compare United States v. Terrell*, ___ F.Supp.2d ___, 2004 WL 1661018 (D. Neb., July 22, 2004) (holding that Guidelines remain constitutional, but facts used for upward enhancements must be submitted to jury and found beyond a reasonable doubt); *United States v. Shamblin*, 323 F.Supp.2d 757, 766 (S.D. W. Va., June 30, 2004) (same), with *United States v. Croxford*, ___ F.Supp.2d ___, 2004 WL 1521560 (D. Utah, July 7, 2004) (observing that Guidelines were designed as an integrated regime, and therefore cannot be severed into constitutional and unconstitutional parts): *United States v. Lamoreaux*, ___ F.Supp.2d ___, 2004 WL 1557283 (W.D. Mo., July 7, 2004) (holding that the Guidelines seem "incapable of being severed in a sensible fashion.").

These decisions are not uniform. The contrasting conclusions of the lower courts create decisions from the Courts of Appeals in direct conflict with other decisions

from other Courts of Appeals. Supreme Court Rules 10(a). This Court should exercise its supervisory power to address and resolve the extraordinary split among the circuits and the district courts.

This Court has already granted certiorari to review these same issues in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004), and *United States v. Fanfan*, ___ F.Supp.2d ___, 2004 WL 1723114 (D. Me., June 28, 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004). Notwithstanding the pendency of these two cases, the instant petition should also be granted because this case involves a significant upward departure decision. The underlying facts of *Booker* and *Fanfan* do not involve contested upward departures from the applicable guideline range. *See Booker*, 375 F.3d at 513-15 (sentencing increase based on judicial findings of fact regarding amount of drugs and obstructive conduct violated Sixth Amendment), *Fanfan*, 2004 WL 1723114 at *5 (addressing findings regarding amount of drugs under Chapter 2 of the Guidelines). A decision by this Court in the unique circumstance of an upward departure from the applicable guideline range may provide additional guidance to the lower federal courts on these important questions of federal law.[3]

Notably, the question of law addressed in *Blakely v. Washington* also involved an upward departure from the applicable guidelines. There may be a compelling argument that adjustments and enhancements under Chapters

[3] In the alternative, this Court could hold this Petition in abeyance pending the final outcome of the Court's decision in *United States v. Booker* and *United States v. Fanfan*.

Two and Three of the federal Sentencing Guidelines should be treated differently from upward departures from the guideline range. It seems advisable for this Court to analyze and address the Sixth Amendment right to a jury trial not only in the context of adjustments and enhancements under the Sentencing Guidelines, but also in the context of an upward departure from the applicable guideline range.

B. This Case Presents An Important, Unresolved Question of Federal Law

This case also presents an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rules 10(c). Because the liberty interests of thousands of defendants are dependent on inconsistent rulings of the lower federal courts regarding the Guidelines, this Court should settle the debate. Most sentencing decisions in federal courts involve some judicial findings of fact concerning specific offense characteristics or adjustments found in Chapters 2 and 3 of the United States Sentencing Guidelines. *See also Blakely,* 124 S. Ct. at 2549-50 (O'Connor, J., dissenting). As Justice O'Connor observed in *Blakely,* the number of appeals pending that involve federal criminal sentences calculated under the Sentencing Guidelines is staggering. *Blakely,* 124 S. Ct. at 2549-50 (O'Connor, J., dissenting). The important question of federal law that has not been, but should be settled by this Court, is whether upward adjustments, enhancements and departures under the federal Sentencing Guidelines based on judicial findings of fact must comply with the Sixth Amendment right to a trial by jury.

The compelling and important question of federal law is presumably another reason why this Court recently granted review in two cases regarding the applicability of *Blakely v. Washington* to the United States Sentencing Guidelines. *See United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004); *United States v. Fanfan*, ___ F.Supp.2d ___, 2004 WL 1723114 (D. Me., June 28, 2004), *cert. granted*, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004). As previously noted, this Petition should also be granted for the Court to analyze the Sixth Amendment and apply its holding in *Blakely* to upward departures.

C. Alternative Argument Regarding Constitutionality of the Guidelines

As previously noted, some district courts have concluded that the Sentencing Guidelines cannot be severed and are therefore entirely unconstitutional. *See, e.g., United States v. Croxford*, ___ F.Supp.2d ___, 2004 WL 1521560 (D. Utah, July 7, 2004); *United States v. Lamoreaux*, ___ F.Supp.2d ___, 2004 WL 1557283 (W.D. Mo., July 7, 2004). This Court may reach a similar conclusion in the pending cases of *United States v. Booker* and *United States v. Fanfan*. In the alternative, and to properly preserve all issues for review, this Court should grant this petition to also address whether the Sentencing Guidelines are entirely unconstitutional in light of *Blakely v. Washington*. The Petitioner respectfully argues in the alternative that the Sentencing Guidelines are entirely unconstitutional, which would render his entire sentence invalid.

II. Assuming the Guidelines Remain Constitutional and Applicable in this Case, The District Court's Upward Departure From An Applicable Guideline Range of 210 to 262 Months to a Sentence of 360 Months Imprisonment Constitutes an Unreasonable Departure and a Misapplication of the Guidelines

When Congress passed the Sentencing Reform Act of 1984, it was clearly of the view that sentencing disparities existed in the federal system, at least in part due to the unfettered discretion conferred on sentencing courts. S. Rep. No. 225, 98th Cong., 1st Sess., 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 (disparities "can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence."); *see also Blakely v. Washington,* 124 S. Ct. 2531, 2544 (2004) (O'Connor, J., dissenting) ("This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories."). A system of sentencing guidelines were viewed at that time as an important limitation on the discretion of the sentencing courts. Although 18 U.S.C. § 3553(b) provides limited discretion for departures from the applicable guideline range in narrow circumstances, Congress clearly intended for the Guidelines to be applied in the majority of the cases, with departures only reserved for rare instances. S. Rep. No. 225, 98th Cong., 1st Sess., 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235; *see also* U.S.S.G. Ch.1, Pt.A, intro. comment. (n.4(b)) ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

The Sentencing Reform Act requires that any departure from the applicable guideline range be "reasonable." In cases involving a departure from the applicable guideline range, the reviewing court is statutorily authorized to review whether the sentence departs to "an unreasonable degree" from the applicable guideline range. 18 U.S.C. § 3742(e)(3)(C). If the reviewing court concludes that the sentence is outside the applicable guideline range to an unreasonable degree, the court of appeals can set aside the sentence as being too high and remand the case for further proceedings. 18 U.S.C. § 3742(f)(2).

Recent measures by Congress were intended to limit or restrict the discretion of sentencing courts with respect to departures from the guidelines. *See generally* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(d), 117 Stat. 650, 670 (2003). Clearly, the current view of Congress is that district courts should strive to follow and apply the Guidelines in the large majority of the cases to achieve uniform and consistent sentences without disparities.

A. This Case Presents An Important Question of Statutory Law that Should Be Resolved by this Court Concerning the Reasonableness of Upward Departures

This Court has recognized that a reviewing court is obliged to conduct two separate inquires when reviewing a departure sentence: 1) whether the sentence imposed was either in violation of law or as a result of an incorrect application of the Guidelines; and 2) if the departure is not the result of an error in interpreting the Guidelines, whether the resulting sentence was an unreasonably high

or low departure from the relevant guideline range. *Williams v. United States,* 503 U.S. 193, 202 (1992). There has not, however, been clear guidance or instruction to the lower courts regarding the precise mechanism for reviewing the extent or reasonableness of a departure. This case presents an excellent vehicle for this Court to provide guidance to the lower federal courts concerning the extent and the reasonableness of departures from the Guidelines.

In this case, the Petitioner's initial sentencing range included a significant base offense level of twenty-five and numerous upward enhancements for life-threatening bodily injuries, for abusing a position of trust, for vulnerable victims, a separate enhancement for a large number of vulnerable victims, and the maximum increase of five levels by operation of the grouping rules. The Guidelines in this instance contemplated the circumstances of this case. A departure from a range of 210 to 262 months, up to 360 months imprisonment, is *per se* unreasonable and demonstrates the attendant failings of judicial discretion.

This upward departure implicates a core concern recognized in *Apprendi* that a criminal defendant should have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of his guilty plea. *Apprendi v. New Jersey,* 530 U.S. 466, 478 (2000). The Sentencing Guidelines serve no legitimate purpose if a defendant is convicted of tampering offenses and is subjected to numerous upward adjustments resulting in an applicable range of 210 to 262 months, but a district court upwardly departs 150 months from the low end, or 98 months from the high end of the range. This Court should grant the petition to provide proper guidance to lower courts regarding the extent and the reasonableness of departures from the applicable guideline range.

B. The Incorrect Application of the Guidelines

The stated reasons for the upward departure constitute an incorrect application of the Guidelines. This presents an important question of law regarding the applicability of the Sentencing Guidelines.

1. Departure Based on Psychological Injuries to Victims was not Justified by Factual Record and was Improperly Found by Preponderance of Evidence, Demonstrating an Important Question of Federal Law that Should be Settled By this Court

The Eighth Circuit found that there was sufficient evidence of psychological injuries to victims based on victim-impact letters contained in the presentence investigation report. Pet. App. at 9-12. These provisions quoted in the Eighth Circuit opinion below include generalized descriptions of fear, stress, anxiety, anger, concerns about cancer, sleepless nights, doubts about treatment, and feelings of loss of self control. Pet. App. at 9-12. However, neither these provisions nor the opinion of the district court identify a particular victim or their psychological condition in its departure decision. These excerpts do not specify particular psychological injuries, symptoms or diagnoses. There was no evidence from mental health professionals. There was no evidence concerning psychological or psychiatric records demonstrating the psychological injuries that supported the departure. At best, the district court's opinion was a generalized speculation about the stress and anxiety of cancer patients. *See* Pet.

App. at 16-18. This generalized statement is not sufficient grounds for an upward departure of this magnitude.[4]

The Sentencing Guidelines provide useful guidance as to whether psychological injuries are "extreme" to warrant an upward departure:

> Normally, psychological injury would be sufficiently severe . . . only when there is a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or changes in behavior patterns.

U.S.S.G. § 5K2.3; *see also* U.S.S.G. § 2N1.1, comment. (n.1) (providing that an upward departure may be warranted where offense caused "extreme" psychological injury). The victim letters relied upon by the district court and the Eighth Circuit do not meet this definition and are not sufficient to establish a basis for an upward departure, or a departure of this magnitude.

The district court employed a preponderance of evidence standard concerning the departure for psychological injuries. This Court's holding in *Blakely v. Washington,* 124 S. Ct. 2531 (2004) requires that facts used to increase a sentence should be determined using the

[4] The Petitioner recognizes that Rule 10 of the Supreme Court rules states that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. This case presents such a rare circumstance due to the nature and extent of the upward departure.

reasonable doubt standard. The use of a preponderance of evidence standard also violated the Petitioner's right to due process of law guaranteed by the Fifth Amendment to the United States Constitution. U.S. Const., Amend V.

The upward departure based on psychological injuries also constitutes impermissible double-counting, in that there was a two level enhancement for vulnerable victims under U.S.S.G. § 3A1.1(b)(1). The application notes to this section specifically reference that the enhancement applies in a situation where an ineffective cancer cure was marketed. U.S.S.G. § 3A1.1, comment. (n.2). The Eighth Circuit rejected this double-counting argument by simply noting that the upward departure based on psychological injuries and the vulnerable victim enhancements "account for different kinds of harm." Pet. App. at 12. This Court should review this legal issue to provide guidance regarding impermissible double-counting under the Guidelines.

2. This Case Directly Conflicts with Another Eighth Circuit Opinion Regarding Psychological Injuries

In its judgment and rehearing decision, the Eighth Circuit did not address its previous opinion in *United States v. Fawbush,* 946 F.2d 584 (8th Cir. 1991). The *Fawbush* decision involved an upward departure based on psychological injuries to the victims of aggravated sexual assault. In a generalized fashion, the district court in *Fawbush* noted that one of the victims had been in individual and family therapy, and that it was "well-known" that when a victim is of a tender age, the psychological impact is much greater. *See Fawbush,* 946 F.2d at 586. The Eighth Circuit, however, reversed the departure, holding that the record did not provide an adequate basis for

departure. *Id.* The Eighth Circuit noted in *Fawbush* that the record did not contain evidence that either victim suffered psychological harm greater than that normally resulting from a sex offense, and that the evidence of counseling or generalized conclusions by the court regarding the impact supplied an inadequate basis for upward departure. *Id.*

The holding in this case conflicts with *Fawbush*. The departure in this case was based on generalized notions about the impact of a tampering offense on the victims, and on generalized statements regarding stress and anxiety. This Court should grant the petition to address the conflict between this case and the Eighth Circuit opinion in *Fawbush*.

3. Upward Departure under Grouping Rules was an Incorrect Application of the Guidelines, Creating an Important Question of Federal Law that Should be Addressed by this Court

The presentence investigation determined that there were eight units for the eight product tampering counts. Pet. App. at 4. The Petitioner received a five level enhancement for six units, under U.S.S.G. § 3D1.4, which provides for a five level enhancement for "more than five units" (i.e., six units). The group of adulteration and misbranding counts did not result in any additional units under the provisions of the Guidelines. Pet. App. at 4. As pointed out by the district court, the Guidelines encourage a departure if there are significantly more than five units. Pet. App. at 15. The Petitioner argued as a matter of law that eight units is not "significantly more than five units"

to either warrant an upward departure or warrant the extent of the departure.

The Eighth Circuit looked to relevant offense conduct admitted by the Petitioner to suggest that there should have been thirty-four total units. Relying on U.S.S.G. § 1B1.2, the Eighth Circuit concluded that the additional relevant offense conduct should have been treated as if there were 152 counts of conviction for thirty-four total victims, creating a total number of units of thirty-four, which is significantly more than five units to warrant departure. Pet. App. at 7-8.

This constitutes an incorrect application of the Guidelines. The Application Notes to section 1B1.2(c) of the Guidelines state:

> Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be **only one count of conviction.**

U.S.S.G. § 1B1.2(c), comment. n.3 (emphasis added). Here, there were numerous counts of conviction. This application note suggests that section 1B1.2(c) should only apply if there is one count of conviction. This commentary is binding. *See Stinson v. United States,* 508 U.S. 36 (1993). Finally, the district court employed a preponderance of evidence standard concerning this departure consideration which deprived the Petitioner of due process of law under the Fifth Amendment to the United States Constitution. U.S. Const., Amend. V.

The central thrust of this final argument concerning the misapplication of the Guidelines is that a defendant subject to the federal Sentencing Guidelines should only be held accountable if the factual record proves that a

departure is warranted. The psychological injuries were not proven and the grouping rules were misapplied. This constitutes an important question of federal law that should be addressed by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JAMES R. HOBBS
(*Counsel of Record*)
W. BRIAN GADDY
WYRSCH HOBBS & MIRAKIAN, P.C.
1101 Walnut, Ste. 1300
Kansas City, MO 64106
(816) 221-0080

DAVID B.B. HELFREY
GARY W. HART
HELFREY SIMON & JONES, P.C.
120 South Central, Ste. 1500
St. Louis, MO 63105
(314) 725-9100

Attorneys for Petitioner

August 25, 2004

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-4083

United States of America, Appellee, v. Robert Ray Courtney, Appellant.	* * * * * * *	Appeal from the United States District Court for the Western District of Missouri. [PUBLISHED]

Submitted : September 9, 2003
Filed : April 5, 2004

Before LOKEN, Chief Judge, McMILLIAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Robert Ray Courtney, a pharmacist, diluted several chemotherapy drugs before distributing them for administration to cancer patients. His profit-making scheme was detected when one of the doctors who bought from Courtney became suspicious that he was selling more chemotherapy drugs than he was buying from the manufacturers. The doctor took a dose of Taxol that Courtney had recently supplied for one of her patients and sent it to a lab for analysis. The lab reported that it contained 32% of the Taxol it was supposed to contain. The doctor then met with FDA and FBI agents.

The federal agents tested seven additional samples of Gemzar and Taxol that Courtney had supplied for the doctor's patients. They found that the doses contained from 17% to 50% of the chemotherapy drugs they were supposed to contain. The federal agents then had the doctor order doses of Platinol, Zofran, Gemzar, Taxol, and Paraplatin from Courtney using fictitious patient names. Lab testing revealed that these samples contained from 0% to 65% of the dosages that the doctor had ordered and that Courtney had represented they contained.

Authorities executed a search warrant at Courtney's pharmacy, and he was arrested and indicted. He pleaded guilty to eight counts of product tampering causing serious bodily injury, in violation of 18 U.S.C. § 1365(a)(3) (2002), and twelve counts of adulterating or misbranding a drug, in violation of 21 U.S.C. § 331(k).

As part of his written plea agreement, Courtney stipulated to the following factual basis for the eight product-tampering offenses. He diluted a dose of Taxol for each of two patients, resulting in serious bodily injury to them when it was administered. He diluted a dose of Gemzar for each of six patients, resulting in serious bodily injury to them when it was administered. Courtney stipulated to the following factual basis for the twelve adulterating/misbranding counts. When the doctor ordered the chemotherapy for the fictitious patients, Courtney supplied six doses of Gemzar and Taxol, each of which he had adulterated by dilution but mislabeled as undiluted.

Courtney also stipulated to the following crimes beyond his twenty offenses of conviction. As to the eight patients who were named in the product-tampering charges, he diluted fifty additional doses of Gemzar and

Taxol that were administered to them. As to twenty-six more patients who were not identified in the indictment, Courtney diluted 102 doses of Gemzar and Taxol that were administered to them. Courtney also admitted that he had sold stolen Gemzar and Taxol, that he had diluted Platinol and Paraplatin, and that he had caused false Medicare claims to be filed by not disclosing his tampering to the physicians to whom he distributed diluted drugs.

The district court[1] made the following Sentencing Guidelines calculations. Each of the eight product-tampering convictions was placed in a single-count group because each involved a different victim. *See* U.S. Sentencing Guidelines Manual (USSG) § 3D1.2(b) (2000). Each single-count group carried an adjusted offense level of thirty-five: a base offense level of twenty-five, *see* USSG § 2N1.1(a), a four-level enhancement for causing life-threatening bodily injury, *see* USSG § 2N1.1(b)(1)(A), a two-level enhancement because the victims were vulnerable, *see* USSG § 3A1.1(b)(1), a two-level enhancement because there was a large number of vulnerable victims, *see* USSG § 3A1.1(b)(2), and a two-level enhancement for abuse of a position of trust and use of a special skill, *see* USSG § 3B1.3.

The twelve adulterating/misbranding convictions were grouped together. The group carried an adjusted offense level of twenty-four: a base offense level of six, *see* USSG § 2N2.1(a), an eight-level enhancement for the value of the diluted drugs, *see* USSG § 2F1.1(b)(1)(I), a two-level enhancement for more than minimal planning and a

---

[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

scheme to defraud more than one victim, *see* USSG § 2F1.1(b)(2), a two-level enhancement for the risk of serious bodily injury, *see* USSG § 2F1.1(b)(7)(A), a two-level enhancement because the victims were vulnerable, *see* USSG § 3A1.1(b)(1), a two-level enhancement because there was a large number of vulnerable victims, *see* USSG § 3A1.1(b)(2), and a two-level enhancement for abuse of a position of trust and use of a special skill, *see* USSG § 3B1.3.

Under the grouping rules, the combined offense level was determined by beginning with the offense level, thirty-five, for the group with the highest offense level. Each of the eight product-tampering single-count groups received one unit apiece because they were equally serious. *See* USSG § 3D1.4(a). The group containing the twelve adulterating/misbranding counts received no units because it was nine or more levels less serious than the product-tampering groups. *See* USSG § 3D1.4(c). Although there were eight units, the grouping rules apply a flat five-level offense-level increase regardless of how many more than five units there are. *See* USSG § 3D1.4. Courtney's highest offense level was thus increased by five levels, bringing his combined offense level to forty. He received a three-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, making his total final adjusted offense level thirty-seven. With a Category I criminal history, his Guidelines imprisonment range was 210-262 months.

The district court departed upward by three offense levels to level forty, which carries a Guidelines imprisonment range of 292-365 months, and imposed a 360-month prison sentence within that range. The court justified its upward departure on four grounds: the grouping rules disregarded Courtney's significant number of additional

offenses, Courtney significantly endangered public health, Courtney's conduct caused extreme psychological injury to his victims, and the Guidelines calculations did not take into account Courtney's uncharged criminal conduct. The experienced district judge stated that, in his view, any one of the four grounds was sufficient to justify the three-level upward departure.

Courtney appeals the district court's upward departure. Because we conclude that at least two of the reasons cited by the district court solidly support the three-level upward departure, we affirm.

I.

During the pendency of Courtney's appeal, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003 was enacted. Prior to the PROTECT Act, we would have reviewed the district court's departure under a unitary abuse-of-discretion standard. Subsequent to the PROTECT Act, we review de novo whether the factors upon which the district court relied advance the objectives set forth in 18 U.S.C. § 3553(a)(2), are authorized under 18 U.S.C. § 3553(b), and are justified by the facts of the case. *See United States v. Agee*, 333 F.3d 864, 866-67 (8th Cir. 2003). We may apply the new standard of review to pending appeals, *see United States v. Hutman*, 339 F.3d 773, 775 (8th Cir.), *cert. denied*, 124 S. Ct. 842 (2003), particularly when, as here, stricter scrutiny of the district court's upward departure is to the defendant's advantage. After the PROTECT Act, we continue to review the district court's factual findings for clear error and the reasonableness of a permissible departure

for abuse of discretion. *See United States v. Flores*, 336 F.3d 760, 763 (8th Cir. 2003).

II.

One reason the district court departed upward was that the Guidelines did not provide any incremental punishment for Courtney's seventh and eighth product-tampering convictions, or for his additional uncharged but admitted crimes. "A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)." USSG § 1B1.2(c). Courtney stipulated in his written plea agreement that he had diluted fifty additional doses of chemotherapy drugs that were administered to the eight patients named in the indictment, and that he had diluted 102 doses of chemotherapy drugs that were administered to twenty-six more patients. Under this provision of the Guidelines, Courtney's Guidelines calculations should have proceeded as if he had been convicted of 152 additional product-tampering charges.[3]

The grouping rules should have been applied to these 152 offenses, along with Courtney's twenty offenses of

[3] Because the presentence report overlooked the proper treatment of these 152 additional offenses, so did the district court. Although this was error, we are satisfied that it was harmless to Courtney. Given that the district court based its upward departure on an undercounted number of offenses, we have no doubt that if presented with the proper count, the court would have departed as far upward as it did. *See Williams v. United States*, 503 U.S. 193, 203 (1992) (when district court misapplies Guidelines, remand is necessary only "if the sentence would have been different but for the district court's error").

conviction. *See* USSG § 1B1.2, comment. (n.3); *United States v. Collar*, 904 F.2d 441, 443 (8th Cir. 1990). When the eight product-tampering counts in the indictment are grouped with the fifty additional product-tampering offenses against the eight victims identified in the indictment, the result is that Courtney has eight multiple-count groups rather than eight single-count groups. *See* USSG § 3B1.2(b). Turning to the 102 product-tampering offenses involving the twenty-six victims not identified in the indictment, these offenses should have been grouped by victim, resulting in twenty-six additional groups. *See id.* The grouping of Courtney's twelve adulterating/misbranding convictions into one multiple-count group would have remained the same. There would have been a total of thirty-four product-tampering groups and one adulterating/misbranding group.

Courtney's combined offense level would have been the same. The adulterating/misbranding group still would have received no units because it was nine or more levels less serious than the product-tampering groups. Each of the thirty-four product-tampering groups would have received one unit apiece because they were equally serious. Although there would have been thirty-four rather than eight units, Courtney still would have received the same five-level offense-level increase under USSG § 3D1.4 that applies regardless of how many more than five units are present.

The district court correctly cited the provision of the Guidelines that specifically authorizes a departure when the flat five-level increase disregards a significant number of units: "Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in

a total of significantly more than 5 Units." USSG § 3D1.4, comment. (backg'd). It is a question of first impression in this circuit how many units are "significantly more than five." A survey of cases from other circuits shows how many units are significantly more than five, and how great of a departure they justify. *See United States v. Wolfe,* 309 F.3d 932, 935 (6th Cir. 2002) (ten units justified two-level upward departure); *United States v. Szabo,* 176 F.3d 930, 933 (7th Cir.) (nine units justified three-level upward departure), *cert. denied,* 528 U.S. 912 (1999); *United States v. MacLeod,* 80 F.3d 860, 865-66, 869 (3d Cir. 1996) (ten units justified two-level upward departure); *United States v. Okane,* 52 F.3d 828, 832-33 (10th Cir. 1995) (ten units justified one-level upward departure); *United States v. Pearson,* 911 F.2d 186, 189-90 (9th Cir. 1990) (eight units justified one-level upward departure); *United States v. Chase,* 894 F.2d 488, 491 (1st Cir. 1990) (fifteen units justified five-level upward departure).

We have no difficulty concluding that Courtney's offenses of conviction, combined with his other admitted relevant conduct offenses, resulted in significantly more than five units.[3] Nor do we have any difficulty concluding that the need to provide incremental punishment for these additional units, viewed alone or in conjunction with the

[3] Because the eight victims identified in the indictment were used to enhance Courtney's offense level under USSG § 3A1.1(b)(2) (large number of vulnerable victims), he argues that it would be impermissible double-counting to use the units resulting from the offenses against those victims as the basis for an upward departure under USSG § 3D1.4. We may assume without deciding that Courtney is correct because, regardless of whether it was thirty-four units or twenty-six units that went unpunished, we would conclude that either number was significantly more than five units and justified a three-level upward departure.

other basis for departure discussed below in section III of this opinion, fully justified the district court's three-level upward departure.

III.

Another reason the district court departed upward was to account for the extreme psychological harm caused by Courtney's conduct. The district court correctly cited the provision of the Guidelines specifically authorizing such a departure: "The base offense level [for tampering with consumer products] reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense . . . caused extreme psychological injury . . . , an upward departure may be warranted." USSG § 2N1.1, comment. (n.1). The district court accurately noted that Courtney's offense level had been enhanced under USSG § 2N1.1(b)(1)(A) only for causing life-threatening *bodily* injury, such that it would not be double-counting to depart upward on the basis of extreme *psychological* injury. The district court explained:

> Cancer patients understandably suffer from a high degree of anxiety and stress as their lives hang in the balance. Often, their sole hope for survival – not necessarily recovery, but mere survival – depends upon these drugs. The hope is an uncertain one, as there is often no guarantee whether or to what extent the drugs will prove effective in a given case. Early treatment is, as is the case with many diseases, instrumental in determining the ultimate success – and now these patients have learned that they effectively had no treatment whatsoever. Their anxiety and stress has been compounded to a degree beyond

> any possible comprehension: those still living face not only the uncertainty presented by their illness, but the uncertainty as to "what might have been" had Defendant not engaged in criminal conduct – whether they might feel better or live longer, or whether their prognosis would be better had they received the intended medication.

United States v. Courtney, 240 F. Supp. 2d 1052, 1054 (2002).

We agree. The unobjected-to portions of the presentence report are replete with victim-impact statements that illustrate the extreme psychological harm suffered by Courtney's direct victims. A woman who received four diluted chemotherapy doses wrote, "Being diagnosed with ovarian cancer and dealing with the fact that you may not be around to see your kids grow up [is hard enough] without having to deal with someone doing this to you. The fear alone is indescribable. You wonder[,] if you would have gotten the medication you were supposed to have[,] if your cancer would have come back or not." Another woman in the same position wrote, "I have suffered worry, stress[,] and extreme anxiety concerning the recurrence of the disease after the initial period. Would the disease have 'come back' if the initial treatments had been full dosage? We'll *never* know! I have felt intense *anger* and related stress from the knowledge of Courtney's deliberate wrong doing directly related to me. Will I be able to conquer this disease or have his actions reduced my odds in any fashion[?] Will my life be shortened by this crime?" A female victim who received seven diluted chemotherapy doses wrote, "Emotionally, it has affected me the most. It is a very hard thing to deal with. I lose my self control and cry when I think of Courtney – how he would take someone's

life for money." A woman who received two diluted chemotherapy doses wrote, "Lots of sleepless nights. Lots of stress not knowing what [w]as done to my body. If Gemzar had been a regular chemo (not diluted)[,] I wouldn't have pancreatic cancer on my liver now."

A female victim who received seven diluted chemotherapy doses wrote, "This crime takes hope away that the treatment was effective and has created doubt. I feel like I have lost peace of mind because I worry about future occurrences of cancer and if I will receive the correct dosing of medicine." Another female patient wrote, "When I was diagnosed with cancer, I discovered I had to fight an emotional battle as well as a physical one. During this time, I tried to accept that I had a very dangerous set of cells invading my body. Early last fall, I discovered I had another force invading my body. This was one I hadn't counted on. I had to face the reality that someone had purposely diluted the drugs going through my body. I have no idea how it affected my disease, but I felt violated – I felt raped."

A woman who received six diluted doses wrote, "I saw [the doctor] in February of 2001 and began chemo treatments of Taxol and Carboplatin immediately. Because I had responded favorably to these two chemo drugs previously, it was only natural to expect the same response. Unfortunately my health worsened and in March I had to resign from my position [at work]. [The doctor] decided to try a different treatment using Gemzar, but it still didn't improve my situation at all. It wasn't until August of 2001 when I was told I had received diluted chemo drugs from Mr. Courtney's pharmacy that it all made sense why my health was failing. I feel as though my family has been short changed. I feel my whole future has been taken away

from me." These are only some excerpts from the numerous victim-impact statements provided by the direct victims of Courtney's chemotherapy-dilution crimes.

Since this circuit has not previously considered an upward departure under USSG § 2N1.1, comment. (n.1), we have reviewed our cases dealing with other Guidelines provisions authorizing upward departures for extreme psychological injury. *See, e.g., United States v. Thin Elk,* 321 F.3d 704 (8th Cir. 2003); *United States v. Rose,* 315 F.3d 956 (8th Cir.), *cert. denied,* 123 S. Ct. 2238 (2003); *United States v. Hampton,* 260 F.3d 832 (8th Cir. 2001), *cert. denied,* 535 U.S. 1058 (2002); *United States v. Lewis,* 235 F.3d 394 (8th Cir. 2000); *United States v. Sample,* 213 F.3d 1029 (8th Cir. 2000); *United States v. Otto,* 64 F.3d 367 (8th Cir. 1995), *cert. denied,* 516 U.S. 1133 (1996); *United States v. Yellow,* 18 F.3d 1438 (8th Cir. 1994). Having reviewed the facts and legal principles discussed in those cases, we are satisfied that in sentencing Courtney, the district court did not err by departing upward on the basis of the extreme psychological harm his victims suffered. We are further satisfied that this ground for departure, viewed alone or in conjunction with the other basis for departure discussed in section II of this opinion, justified the full extent of the district court's three-level departure. Finally, we reject Courtney's argument that the district court engaged in impermissible double-counting by enhancing his offense level on the basis that the victims were vulnerable and by departing upward on the basis that the victims suffered extreme psychological injury; these Guidelines provisions account for different kinds of harm. *See generally United States v. Fortney,* 357 F.3d 818, 821-22 (8th Cir. 2004) (defining double-counting).

IV.

Accordingly, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 01-00253-01-CR-ODS
ROBERT RAY COURTNEY,	)	
Defendant.	)	

ORDER SPECIFYING REASONS FOR UPWAWRD DEPARTURE

Earlier today, the Court sentenced Defendant Robert Ray Courtney to a term of imprisonment of 360 months. In so doing, the Court declared that it was departing upward from the Sentencing Guidelines by adding three levels to Defendant's Total Offense Level. The Court identified four grounds that independently justified a three level increase and a fifth that the Court expressly refrained from ruling on. This Order further details the Court's reasoning with respect to the four grounds for departure.

First, for purposes of the grouping rules, Counts One through Eight were treated as separate units for purposes of the grouping rules contained in section 3D1.4. Despite the presence of eight such distinct groups, only five levels could be added to the offense level. Moreover, Counts 9 through 20 were grouped together and had no impact in the guideline calculation because the offense level on those counts was eleven levels lower than offense level for Counts 1 through 8.

The background to section 3D1.4 states that "[i]nasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 units." Elsewhere, the Background also indicates that in unusual cases disregarded counts may justify an upward departure. The possibility for a departure on these grounds was recognized by the Eighth Circuit in *United States v. Brown*, 287 F.3d 684 (8th Cir. 2002). In affirming the district court's decision to depart upward based on section 3D1.4's background statement, the court of appeals noted that the guideline "entirely withdrew from the combined offense level computation" three separate counts of criminal conduct while the evidence indicated that the conduct occurred on different occasions. Here, section 3D1.4 totally disregards the same number of crimes as in *Brown* – Counts 6 through 8 – that involved different victims and were committed at distinct times. In addition, section 3D1.4 totally disregards Counts 9 through 20, which involved Defendant's provision of adulterated and misbranded drugs for fictitious patients during a sting conducted in the course of the Government's investigation.

The Court is mindful that Defendant's adjusted offense level already includes an enhancement under section 3A1.1(b) because there were a large number of vulnerable victims, but an additional increase remains justified. First, the Defendant did not simply commit a single crime that had many vulnerable victims; he committed multiple crimes – most of which targeted a distinct, unique victim. The Defendant is not in the same situation as one who concocts a fraud scheme to which many people fall prey; he consciously decided, on multiple occasions, to

commit an additional crime, knowing that each time he did so another patient was victimized. In addition, most of the patients covered by the Indictment were victimized on multiple occasions. Thus, while his crimes targeted many vulnerable victims, the manner in which he created his victims is singular and unusual, and is not fully contemplated by the enhancement for multiple victims. It is appropriate, as suggested by the Background Notes to section 3D1.4, to depart in situations where there is inadequate scope to insure appropriate additional punishment for the additional crimes Defendant committed.

Second, the Court holds that an upward departure is warranted by virtue of section 5K2.14 because the defendant significantly endangered public health. Defendant has, on 160 different occasions, deprived 34 different people of potentially life-saving or life-prolonging medication, specifically Taxol and Gemzar. Defendant has also admitted to diluting and tampering with other medication (Platinol and Paraplatin), affecting an unspecified number of patients. Finally, Defendant has admitted to selling black market drugs to an unspecified number of consumers. The Court concedes that the very nature of Defendant's crimes implicates public health to a certain degree, but Defendant's crimes have done so to a degree that could not have been anticipated by the Sentencing Commission.

Third, Defendant's conduct posed a unique and substantial risk of psychological injury. There are several guidelines that contemplate these circumstances as justifying an upward departure; the Court will rely on section 2N1.1, Application Note 1, which declares that "[w]here the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property

damage or monetary loss, an upward departure may be warranted." The Court acknowledges that a four level enhancement was imposed under section 2N1.1(b)(1)(A) because victims sustained permanent or life-threatening *bodily* injuries, but the Application Note considers a circumstance not contemplated by the enhancement; namely, extreme *psychological* injury. Cancer patients understandably suffer from a high degree of anxiety and stress as their lives hang in the balance. Often, their sole hope for survival – not necessarily recovery, but mere survival – depends upon these drugs. The hope is an uncertain one, as there is often no guarantee whether or to what extent the drugs will prove effective in a given case. Early treatment is, as is the case with many diseases, instrumental in determining the ultimate success – and now these patients have learned that they effectively had no treatment whatsoever. Their anxiety and stress has been compounded to a degree beyond any possible comprehension: those still living face not only the uncertainty presented by their illness, but the uncertainty as to "what might have been" had Defendant not engaged in criminal conduct – whether they might feel better or live longer, or whether their prognosis would be better had they received the intended medication.

Defendant has relied in part on *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998) in objecting to this ground for departure. *Terry* recognized that the universe of victims includes indirect victims, but held that to be an indirect victim a person had to have a connection to the offense, not merely to a direct victim. Thus, a bank teller on duty at the time of a bank robbery would be an indirect victim, but a family member of one killed by a drunk driver would not be – unless the family member happened to be involved

in or witnessed the incident. 142 F.3d at 711-12 n.17.[1] Assuming that *Terry* is the law of the Circuit, and assuming that the family members in this case are closer to the family members involved in that case (as opposed to the hypothetical described in footnote 17 of that opinion), the record reflects the feelings of and psychological effects upon those receiving Taxol and Gemzar from Defendant. Moreover, Defendant does not seriously dispute that those surviving past the public disclosure of his crimes (including those that unfortunately passed away between that time and today) felt the despair and anguish over the Court described earlier.

Fourth, section 5K2.21 justifies an upward departure. Section 5K2.21 permits a sentence beyond the guideline range to account for uncharged criminal conduct that did not enter into the guideline calculation. As indicated earlier, Defendant admits to having diluted and tampered with other drugs, specifically Platinol and Paraplatin, and to selling black market drugs to consumers. Defendant has also admitted to subjecting 26 additional cancer patients to the same conduct that forms the basis for counts one through eight. In other words, Defendant could have been charged with at least 34 counts of product tampering for providing subpotent Taxol and Gemzar – not just eight counts – as well as charges for selling subpotent Platinol and Paraplatin and black market drugs.

In this regard, Defendant again points to the fact that his sentence was adjusted for the large number of

---

[1] *Terry* involved application of section 5K2.3 of the guidelines, but the language in this section is very similar to that contained in the Application Note relied on by the Court.

vulnerable victims pursuant to section 3A1.1(b)(2), but this contention misses the point. The enhancement for the large number of vulnerable victims does not apply to the uncharged conduct, and the uncharged conduct played no part in supporting this enhancement.

Any one of these four factors justifies an upward departure, and the Court concludes that a departure is warranted. The circumstances described above were not adequately taken into account by the Sentencing Commission when the Guidelines were formulated. Some of the circumstances were considered, but not to the degree present in this case. In accordance with the general Policy Statement contained in section 5K2.0, and for the reasons stated earlier, each ground for departure identified above justifies an upward departure of at three levels, resulting in a sentencing range of 292 to 365 months.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES
DISTRICT COURT

DATE: December 5, 2002

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-4083

United States of America,	*	
Appellee,	*	
v.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Robert Ray Courtney,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

May 27, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

No. 04-264

In the Supreme Court of the United States

ROBERT RAY COURTNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-264

ROBERT RAY COURTNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

AUGUST 2004

* The government waives any further response to the petition unless this Court requests otherwise.